IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 103

ALBERT F. CONN, ROBERT D. FLYNT AND WILLIE E. NELSON,
Petitioners,

v.

THE UNITED STATES.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

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Now comes the undersigned, a member of the bar of this Court, and, with the consent of the petitioners and the respondent, submits the following brief as amicus curiae and on behalf of the International Association of Firefighters, a labor union affiliated with the American Federation of Labor, whose membership includes a considerable number of persons affected by this Court's decision.

These cases present a situation where the judicial arm of the government is unwittingly about to perpetuate an injustice, heretofore recognized and partially corrected by the executive branch, by attributing to the Congress an in-

tent which, by no reasonable stretch of the imagination, it could have had. The question involved concerns a large number of very small claims of forgotten men to whose protection this Court has been accustomed to devote its special interest. It is earnestly submitted, in the light of the following brief discussion, that the question at bar is a substantial one and of sufficient public importance to warrant its consideration by this Court.

By the relevant statutes,[1] it has been provided that overtime compensation at the rate of time and one-half shall be paid all government employees for "*employment* in excess of 40 hours in any administrative workweek" except that, among others, employees "whose hours of *duty* are intermittent or irregular" shall be paid, in lieu of overtime, a $300 lump sum per annum if their basic compensation is less than $2,000 or a flat 15% increase if $2,000 or more.

Petitioners, whose claims are typical of a large number of others similarly situated, were firefighters employed by the War Department. The hours of "duty", prescribed by the War Department as their regular administrative workweek, consisted of 24 hours every other day. Thus, each regularly remained on duty for 168 hours during each two weeks' period or an average of 84 hours per week.

In the beginning, the War Department apparently was perplexed in determining the number of hours of "employment" to be attributed to these firefighters for the purpose of computing overtime in excess of 40 hours per week. It solved this difficulty temporarily by arbitrarily deciding, under the pretended authority of certain Civil Service Commission regulations, that firefighters were employees whose "hours of duty" were "intermittent or irregular" and therefore entitled to only a flat $300 increase instead of time and one-half for overtime.

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[1] Senate Joint Resolution 170 approved December 22, 1942 (P. L. No. 821, 56 Stat. 1068); War Overtime Pay Act of 1943 (57 Stat. 75).

When this court, in the *Armour* and *Swift* cases [2] clarified the situation concerning "stand-by" duty performed by firefighters, the War Department amended its regulations, effective January 1, 1945, to conform to this Court's decision in those cases.[3] As a result, these petitioners and all others similarly situated were declassified as employees having "intermittent or irregular" hours of duty, were reclassified as regular employees and their hours of "employment", in the light of their peculiar duties and this Court's decisions in the *Armour* and *Swift* cases, determined to be 56 hours per week. Since that time petitioners have been paid on an overtime basis but no adjustment was ever made for the prior period, these suits being to recover the amounts due for such period.

No complaint is made against the War Department's administrative determination that the hours of "employment" were 56 per week. But is is preposterous to say that petitioners' hours of "duty" were either "intermittent" or "irregular". There was absolutely nothing intermittent or irregular about them. They were uniform, consistent and regular, were duly prescribed by War Department "administrative workweek" orders and differed from those of the great mass of other regular employees only in that their tours of continuous duty were much longer. The only thing irregular or intermittent about petitioners' duties was the number of hours of *actual* work performed in fighting fires during their stand-by periods of duty.

It may be conceded that the War Department had administrative discretion to determine the number of hours of compensable employment in cases of this sort. But neither the Civil Service Commission nor the War Department had any discretion to determine that consistent and regular duty

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[2] *Armour & Co.* v. *Wantock*, 323 U. S. 126; *Skidmore* v. *Swift & Co.*, 323 U. S. 134.

[3] The Civil Service Commission, in effect, directed it to do so.

was "intermittent" or "irregular" duty, when, in fact, it was not. The Department's original regulations amounted simply to an unauthorized amendment of the statute.

The Civil Service Commission and the War Department ultimately recognized the correctness of the foregoing statement and the amendment of January 1945 resulted. The Court of Claims, however, while conceding the authority of the War Department to promulgate the amended regulations, held that the original regulations were also valid and, indeed, necessary to effectuate the congressional intent. In reaching these curious and irreconcilable conclusions, the Court of Claims relied chiefly on the following two grounds, neither of which is tenable.

(a) The Court feared that the adoption of petitioners' contention might conceivably result in pay increases of from 165 to 480 percent as contrasted with an alleged congressional intent to increase generally the pay of Federal employees approximately 21⅔ percent to compensate for a 20 percent increase in the Federal work week, i.e., from 40 to 48 hours. It is sufficient to say, in this connection, that the amended War Department regulations—which are here accepted to be valid ones—have produced no such grotesque results. On the contrary, they have merely brought the overtime compensation of firefighters into line with that of other regular employees.

(b) The original War Department regulations here challenged were promulgated on December 26, 1942, pursuant to the terms of J. R. 170. "It must be assumed", said the Court of Claims, "that Congress was aware of these contemporaneous interpretations when it enacted the Overtime Pay Act of May 7, 1943, which contained, in Section 3, almost exactly the same language which had been enacted in the last proviso of Joint Resolution 170."

In other words, the Court of Claims has assumed that Congress was aware of and ratified on May 7, 1943, the War Department regulations which had been in effect only

slightly more than four months. Such an assumption, it is believed, carries far beyond its ultimate limits the doctrine of legislative ratification which this Court has viewed with some considerable misgivings on two occasions within the past eighteen months.

In *Girouard* v. *United States*, 328 U. S. 61, 66 S. Ct. 826, 830, Mr. Justice Douglas remarked:

> "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error."

In his concurring opinion in *Cleveland* v. *United States*, 329 U. S. 14, 67 S. Ct. 13, 91 L. ed. 1, Mr. Justice Rutledge said:

> "Notwithstanding recent tendency, the idea cannot always be accepted that Congress, by remaining silent and taking no affirmative action in repudiation, gives approval to judicial misconstruction of its enactments. See Girouard v. United States, 328 U. S. 61."

CONCLUSION.

As pointed out in the petition for rehearing, if this Court declines to pass upon the foregoing situations, a very large number of claimants will be prevented from securing any consideration of their claims.

In the light of the foregoing, it is submitted that the order denying the petition for a writ of certiorari should be set aside and certiorari granted.

Respectfully submitted,

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